The WTO Trade Facilitation Agreement (TFA)

The Trade Facilitation Agreement (TFA) was launched during the WTO Trade Facilitation Negotiations of the Doha Round.\textsuperscript{1131} Even though the subject matter of trade facilitation was already in the WTO agenda at the Ministerial Conference of Singapore in 1996, negotiations began in October 2004. The last version of the TFA was agreed on 7 December 2013 at the Bali Ministerial Conference as part of the “Bali Package.”

The final agreement reached in Bali (Indonesia) contains provisions to promote more efficient customs procedures through effective cooperation between customs and other authorities on trade facilitation and customs compliance issues. Moreover, it includes provisions for technical assistance and capacity building in the trade facilitation area. This last issue has strong relevance due to the concerns of some WTO Member States relating to a new binding WTO agreement on trade facilitation subject to dispute-settlement rules, which could add implementation burdens for developing countries due to their lack of resources to modernise customs facilities.\textsuperscript{1132}

The first important step toward implementing the Declaration on Trade Facilitation agreed in Bali in December 2013 was the unanimous election of Philippine Ambassador Esteban B. Conejos, Jr. as chairperson of the WTO Trade Facilitation Committee on 31 January 2014. In this way, the committee’s role is to ensure the entry into force of the Trade Facilitation Agreement, prepare for its efficient operation, conduct its legal review, and receive notifications of members’ commitments. It will also officially amend the Marrakesh Agreement establishing the WTO by inserting the new Trade Facilitation Agreement in Annex 1A.\textsuperscript{1133}

In light of the above explanation, and according to the interests of this research, the next sections focuses on the TFA’s freedom of transit provision, and its implementation within the WTO Agreement.


\textsuperscript{1132} Ibid.

\textsuperscript{1133} WTO News: “WTO Members elect Trade Facilitation Committee Chair,” available on the Internet at: <http://www.wto.org/english/news_e/news14_e/fac_31jan14_e.htm> (last visit on 31 January 2014).
I The “Freedom of Transit” Provision of the TFA and its Relationship with the GATT 1994 and the ECT

The penultimate Draft of the Trade Facilitation Agreement (TFA) dated from 31 May 2013, and its freedom of transit provision (Art.11 TFA) had eighteen paragraphs – and notably energy transit appears in its first paragraph:

“1. [Goods subject to the provisions on Freedom of Transit of GATT 1994 and of this Agreement include those moved [via fixed infrastructure] \([\text{inter alia} \text{ pipelines and electricity grids}]\).]

[\text{ibis. For greater certainty, nothing in Article V of the GATT 1994 or this Agreement shall be construed to require a Member:}

(a) To build infrastructure of any kind in its territory, or to permit the building of infrastructure by others, in order to facilitate the transit of goods;

(b) [To provide access to any infrastructure for transit unless such infrastructure is open to general use by third parties. For the purpose of this Agreement, the term 'general use by third parties' does not include access to infrastructure granted on a contractual basis.]]”

However, as explained in the last section, on 7 December 2013 the last version of the TFA was agreed at the Bali Ministerial Conference, which changed its freedom of transit provision (Article 11). Thus, this new version of the TFA excludes the sentence “via fixed infrastructure, such as electrical grids or pipelines” but it still mentions in Section 5 of its Art. 11 that “Members are encouraged to make available, where practicable, \(\text{physically separate infrastructure (such as lanes, berths and similar)}\) for traffic in transit.” This is a nonexhaustive list of fixed infrastructure (e.g., lanes and berths), which can be completed with “similar” fixed infrastructure. Consequently, since the new version of the TFA does not exclude either “energy materials and products” or “fixed infrastructure such as grids and pipelines,” energy fixed infrastructure can also be included as “similar separate infrastructure.”

Art. 11 TFA is based on Art. V GATT 1994. Thereby, Art. 11 TFA refers to “traffic in transit,” which is a concept defined by Art. V:1 GATT 1994. Furthermore, Art. 11(12) TFA establishes the commitment “to enhance freedom of transit” and the first sentence of the Final Provision No. 6 of the TFA reads as follows: “Notwithstanding the General interpretative note to Annex 1A, nothing in this

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1134 TN/TF/W/165/Rev.16.
1135 WT/MIN (13) /36 – WT/L/911, on 11 December 2013.